

Decision **DRAFT DECISION OF COMMISSIONER LYNCH**
(Mailed 5/5/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the California Association of
Competitive Telecommunications Carriers for
Modification of the Rules By Which Carriers
Obtain Commission Authority Pursuant to
Sections 851-854 of the Public Utilities Code.

Application 00-12-015
(Filed December 1, 2000)

**OPINION ON COMPETITIVE LOCAL EXCHANGE CARRIERS'
REQUEST FOR ADVICE LETTER TREATMENT
OF SECTIONS 851 THROUGH 854 REQUESTS**

A. Summary

This decision grants in part the application of the California Association of Long Distance Telephone Companies (CALTEL) to expand the advice letter procedure for competitive telecommunications carriers seeking prospective Commission authority to transfer control or assets of non-controversial transactions subject to Pub. Util. Code §§ 851 through 854.¹

B. Categorization

By Resolution ALJ 176-3053, dated December 21, 2000, the Commission preliminarily determined that this proceeding is quasi-legislative and determined that a hearing is not expected. Notice of this application appeared in

¹ All statutory references herein are to the California Public Utilities Code.

the Commission's Daily Calendar of December 19, 2000. There are no filed protests challenging the substance of CALTEL's request, and no opposition to the Commission's categorization and hearing determination. Thus, there is no need to alter the preliminary determinations made in Resolution ALJ 176-3053.

C. Background

CALTEL is a non-profit corporation representing the interest of competitive telecommunications service providers and other entities that provide telecommunications related services.

Until 1994, all telecommunications utilities seeking Commission authority to transfer control or assets subject to §§ 851 through 854 were required to file an application. Decision (D.) 94-05-051 simplified the approval process for nondominant interexchange carriers (NDIECs) by allowing these providers of non-monopoly telecommunications' services to submit an advice letter instead of an application as long as the acquiring entity is either an already certificated telecommunications carrier or the parent of a presently certificated carrier, and none of the parties has gross annual California revenues in excess of \$500 million, pursuant to §§ 854 (b) and (c).² NDIECs that use the advice letter procedure are still required to file an application if the Commission believes that the matter warrants a more comprehensive review. The advantage of the advice letter procedure is that it enables NDIECs to reduce the potential duration of the approval process from several months to 40 days.

² 54 CPUC 2d 520 at 522 and 523.

D.97-06-096 clarified that the advice letter procedure applied to NDIECs seeking Commission authorization for customer base transfers.³ At the same time, NDIECs were required to serve a copy of the advice letter on the Consumer Services Division Director and provide notice to its customers of the proposed transfer. D.98-07-094 further extended the advice letter procedure from NDIECs to Competitive Local Exchange Carriers (CLECs) providing non-monopoly local exchange telecommunications services.

D. Request

CALTEL seeks two modifications to the current procedure governing Commission approval of §§ 851 through 854 transactions for NDIECs and CLECs. The first modification seeks to permit these competitive telecommunications carriers to use the advice letter procedure instead of the application process for “all” prospective transactions subject to these code sections. The second modification seeks to permit the use of an advice letter procedure instead of the application process for the transfer of certificated entities’ control or assets to subsidiaries. Both of these changes would enable NDIECs and CLECs to complete transactions subject to §§ 851 through 854 expeditiously and utilize less Commission staff time. CALTEL’s application focuses on making the advice letter procedure applicable to mergers of certificated entities and to internal corporate reorganizations.

E. Discussion

CALTEL states that it does not seek a precise determination of which transactions are subject to §§ 851 through 854. Further, it does not seek to

³ 73 CPUC 2d 248 at 251.

eliminate or reduce the consumer safeguards established by D.94-05-051 and modified by D.97-06-096. It seeks to enlarge the universe of transactions for which competitive telecommunications carriers can obtain expedited approval through the advice letter procedure.

CALTEL provides two examples of transactions for which carriers are now using the application process and which CALTEL seeks to be subject to the advice letter process. First, CALTEL requests clarity that the advice letter process may be used for mergers of nondominant, certificated entities.⁴ Second, CALTEL requests clarity that the advice letter process may be used for internal corporate reorganizations of certificated entities, including the transfer of a certificate of public convenience and necessity to a wholly owned subsidiary. CALTEL notes that many carriers have filed applications “out of an abundance of caution” because of questions about whether the advice letter process applies to these types of transactions.

We find CALTEL’s request to be consistent with our intent of providing expedited regulatory review of nondominant telecommunications carriers’ matters that generally do not raise concerns regarding the protection of consumer interests or the interests of other market participants. As to the particular issues discussed in CALTEL’s application—mergers and internal corporate reorganizations—we agree that the advice letter process should apply and will modify our rules accordingly. Hence, we modify the rules adopted by D.94-05-051 and modified by D.97-06-096 to incorporate the changes being adopted by this decision. We also update our rules to clarify that the advice

⁴ CALTEL continues to support the unavailability of the advice letter process for mergers subject to Pub. Util. Code §§ 854(b) and (c).

letter process is not available in instances where Commission's California Environmental Quality Act (CEQA) review is required, *i.e.*, where the transaction has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. (CEQA Guideline 15378.) We will further require that carriers seeking to use the advice letter process make an attestation that the transaction does not have a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. These updated rules are set forth in Appendix A of this decision.

However, we cannot accept CALTEL's proposed amendment of our rules to authorize the advice letter process for "all" transactions pursuant to §§ 851 through 854. This broad language would encompass transactions for which the advice letter process may be inappropriate, such as dispositions of utility property involving non-certificated third parties. For example, the sale or lease of utility-owned land to a third party for a construction project unrelated to telecommunications would be eligible for the advice letter process under CALTEL's proposed language, notwithstanding the fact that the project could have a potential environmental impact warranting CEQA review. CALTEL does not attempt to make a case that such dispositions of property involving third parties should be eligible for the advice letter process.

The only comments on CALTEL's application were from the Citizens Companies.⁵ Citizens Companies seek to extend the competitive carriers' advice

⁵ Citizens Companies consist of Citizens Telecommunications Company of California, Inc., Citizens Telecommunications Company of the Golden State, and Citizens Telecommunications Company of Tuolumne.

letter procedure for transactions subject to §§ 851 through 854 to the incumbent local exchange carriers (ILEC) and their affiliates. Absent such approval, Citizens Companies contend that there would be more disparity among the Commission's regulatory and procedural rules between competitive carriers and ILECs.

Even though ILECs may enter into non-controversial transactions, disparities necessarily exist in the regulatory and procedural rules between competitive carriers and ILECs. This is because consumer interests in such transactions involving ILECs utilities require a higher level of scrutiny than in transactions of non-incumbent utilities. This is due to the unique status of ILECs, which continue to exercise market power in at least some of the markets they serve. The procedures and consumer safeguards established by D.94-05-051, modified by D.97-06-096, and the subject of this decision are applicable to nondominant telecommunications utilities, which, by definition, do not exercise market power in any of the markets they serve. Citizens Companies have not convinced us that consumer interest in ILECs and ILEC affiliates transactions subject to §§ 851 through 854 should be brought in line with the regulatory and procedural rules for competitive telecommunications carriers. For that reason, the advice letter procedure being approved by this decision should not be extended to the ILECs and their affiliates at this time.

F. Comments on Draft Decision

The draft decision of Commissioner Lynch in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on May 25, 2004 by CALTEL.

CALTEL sought three modifications to the draft decision. The first modification sought to expand the use of advice letter fillings for all

§§ 851 through 854 requests of NDIECs and CLECs. This modification is rejected because CALTEL has not made a case for why NDIECs and CLECs should be treated differently from other telecommunications carriers. Such a broad change to our rules would allow advice letter processing of transactions involving the transfer of physical assets to third parties, which typically raise more environmental issues than corporate reorganizations and mergers.

CALTEL also sought to eliminate the requirement that the sponsor of an advice letter filing identify any decided or legal pending complaints against the involved entities. CALTEL contends that this notification is overly broad because there is no limit as to subject matter or duration of time and that it is a new requirement not currently in the Commission's rules.

The issue of decided or pending legal complaints goes to the technical qualifications and ability to provide public utility service. In establishing a simplified registration process for nondominant telecommunications firms, nondominant telecommunications carriers are required to attest that "No affiliate, officer, director, general partner, or person owning more than 10% of applicant, or anyone acting in such a capacity whether or not formally appointed, held one of these positions with an IEC that filed for bankruptcy or has been found either criminally or civilly liable by a court of appropriate jurisdiction for a violation of § 17000 et seq. of the California Business and Professions Code or for any actions which involved misrepresentations to consumers, and to the best of applicant's knowledge, is not currently under investigation for similar violations. . . . neither applicant, any affiliate, officer, director, partner, nor owner of more than 10% of applicant, or any person acting in such capacity whether or not formally appointed, has been sanctioned by the

Federal Communications Commission or any state regulatory agency for failure to comply with any regulatory statute, rule, or order.”⁶

The requiring of carriers to disclose complaints in the advice letter is warranted in light of the expedited review that advice letters can afford. Such a process would provide the Commission with less of an opportunity to perform its own research. Complaints, particularly about an entity that would acquire control, may be highly relevant to whether a change in control should be approved. This modification is rejected.

Finally, CALTEL sought to allow the sponsor of the advice letter to attest that the proposed transaction is not subject to CEQA or is otherwise exempt from CEQA review because certain transactions are exempt from CEQA review. This modification is rejected because the application of a CEQA categorical exemption often involves difficult judgments about how the rules apply to particular facts. The Commission, not the parties to an advice letter, should make any such judgment on the applicability of CEQA.

G. Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Michael J. Galvin is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. NDIECs are nondominant providers of interexchange telecommunications services.
2. CLECs are nondominant providers of local exchange telecommunications services.

⁶ D.97-06-107, 73 CPUC 2d 288 at 297 (1997).

3. The Commission has the authority to change the procedure for transfers of control or assets subject to Pub. Util. Code §§ 851 through 854.

4. With respect to mergers between certificated carriers and corporate reorganizations, CALTEL's proposal would substantially shorten the period between competitive telecommunications carriers' requests for authority to transfer control or assets and the date the Commission grants that authority.

5. With respect to mergers between certificated carriers and corporate reorganizations, CALTEL's proposal would retain the Commission's discretion to initiate a formal review of competitive telecommunications carriers' proposals to transfer control or assets.

6. CALTEL proposes broad language that would include dispositions of property involving non-certificated third parties and which may be inappropriate for the advice letter process.

Conclusions of Law

1. CALTEL's application should be granted in part.

2. The procedures described in Appendix A for competitive telecommunications carriers seeking prospective authority to transfer control or assets should be adopted.

3. Because of the public interest in simplified regulatory oversight, the following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Nondominant Interexchange Carriers (NDIEC) and Competitive Local Exchange Carriers (CLEC) may file an advice letter for prospective authority to

transfer control or assets pursuant to Pub. Util. Code §§ 851 through 854 to the extent that the conditions set forth in Appendix A of this order are satisfied.

2. The Executive Director shall cause a copy of this order to be served on all NDIECs and CLECs certificated in California.

3. Application 00-12-015 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A**COMPETITIVE TELECOMMUNICATIONS CARRIERS
PROCEDURE FOR TRANSFERS OF CONTROL OF ASSETS**

1. A Nondominant Interexchange Carrier (NDIEC) or Competitive Local Exchange Carrier (CLEC) certificated by the Commission may file an advice letter, instead of an application, for authority to transfer control or assets, including a merger with another certificated NDIEC or CLEC, pursuant to Pub. Util. Code §§ 851 through 854 if all of the conditions set forth in this appendix are satisfied. The advice letter shall become effective 40 days after filing absent Commission action to suspend the advice letter.
 - a. The advice letter shall (1) advise the Commission that the filing NDIEC or CLEC is a party to a pending transaction for which Commission authority is required, (2) provide the general terms of the transaction, and (3) identify any decided or pending legal complaints against the involved entities, in California or other states.
 - b. The advice letter shall be served on the Director of the Consumer Protection and Safety Division and those persons to whom the entity is already required to serve tariff changes under General Order 96-A.
 - c. Requests for authority to transfer customers shall comply with the customer notification requirements set forth in Decision 97-06-096.
 - d. Financial statements shall accompany the advice letter for any applicant that will continue operations after the transaction has been completed. Financial statements may be filed under seal, but doing so is subject to protest.
 - e. The advice letter text shall describe the terms of the transaction and indicate how any surviving Commission certified entities would modify their tariffs, if at all.
 - f. The advice letter text shall attest that the transaction does not have a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect

physical change in the environment pursuant to California Environmental Quality Act (CEQA) Guideline 15378.

2. Unless suspended by the Commission at the request of the Commission staff, either because of a protest within a 20-day protest period from the date the matter appears on the daily calendar or sua sponte, the advice letter shall take effect and the transaction shall be deemed approved. If the Commission believes that the matter warrants more comprehensive review, the Commission may suspend the advice letter and direct the parties to file an application.
3. The advice letter procedure shall not be used under the following conditions:
 - a. Where an entity acquiring assets or control is not either an already certificated entity or the parent or subsidiary of a presently certified entity. In other words, the advice letter procedure described above may not be used for purposes of market entry.
 - b. Where the transaction involves a CLEC owned or affiliated with a California incumbent local exchange carrier.
 - c. Where transactions are subject to the requirements of Pub. Util. Code §§ 854(b) and (c).
 - d. Where the transaction has a potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. (CEQA Guideline 15378.)

(END OF APPENDIX A)